Some considerations on moral rights in the USA and in the EU today

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Abstract: Alcune considerazioni sui diritti morali negli Stati Uniti e nell'Unione europea oggi – The USA joined the 1886 Berne Convention for the Protection of Literary and Artistic Works only in 1989, with the Berne Convention Implementation Act (BCIA). Thirty years later, the Copyright Office published in April 2019 an extensive study about the American protection of moral rights. The document is studied in comparison with the European Directives and in particular with the Copyright Directive definitively approved a few days before the Copyright Office document. While in the USA the limited interest in moral rights seems to be increasing, in Europe the protection of moral rights risks being waned as it is handed down to individual countries with the explicit declaration that it is not the subject matter of the Directives.

Keywords: Moral rights; Berne Convention; USA; EU; Canada.

1. The Berne Convention Implementation Act (BCIA) 30th relevant anniversary

In 2019 the USA celebrated the 30th anniversary of joining the Berne Convention with a renewed interest in moral rights which is worth dwelling on. The BCIA of 1988 ratified the US adhesion to the Berne Convention a century after its promulgation. This included the protection of the right to attribution and to integrity provided by article 6 bis of the Convention[1].

Although the Copyright Act of 1976[2] did not include an explicit recognition of moral rights, the Congress, after a specific in-depth examination, considered that the US legal system already met the standards required by the Berne Convention. This suitably ensures an appropriate level of safeguard without any need for specific integrations[3].

*The US Copyright Office Report was issued in April 2019 while I was visiting at Columbia Law School hosted by Prof. Jane Ginsburg whom I deeply thank. I also express my gratitude to Dr. Loris Mirella, Director of the IP Trade Policy Division of Global Affairs Canada, for the Canadian suggestions. For a more extensive analysis of moral rights, see L. Moscati, *Origins, Evolution and Comparison of Moral Rights between Civil and Common Law Systems*, forthcoming in *European Business Law Review*, 1 (2021).

[1] *Berne Convention Implementation Act of 1988*, 17 U.S.C. 101.

[2] Codified in Title 17 of the *United States Code*: *Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code*.

[3] It is interesting to note that in the latter part of the Eighties the WIPO Director-General Arpad Bogsch himself considered the level of protection of moral rights already provided by

Thirty years after the BCIA in April 2019 upon the initiative of the Congress, the Copyright Office published a Report discussing the level of protection of moral rights in the USA and examining possible proposals of amendments[4]. In fact, since 2014 the demand for a review of moral rights legislation has been growing significantly given the fact that court decisions in the application of the Supreme Court decision in Dastar v. Twentieth Century Fox had mitigated its scope[5].

More precisely, the dispute concerned a television series titled "Crusade in Europe" produced on behalf of Fox, based on a 1948 book by Dwight Eisenhower. The television series aired in 1949 but Fox did not renew the copyright and the TV show entered into the public domain in 1977. In 1988, Fox reacquired the television rights from the author of the book. However, in 1995 Dastar purchased the videotapes of the show aired in 1949, copied the tapes, trimmed the footage to approximately half of the original length and sold the product with a partially modified title. Fox sued Dastar, specifically claiming the reverse passing off in violation of the Lanham Act, due to the failure of Dastar to credit the earliest creators of the original television series.

The Supreme Court stated that once a copyrighted work falls into the public domain, anyone can freely use the work, even without the attribution to the creator. According to the interpretation of the Supreme Court, the promoters of the tangible product sold in the market are to be considered as the originators, instead of the person or the entity who created the ideas contained in the 'good'.

The US legislation prior to the adhesion to the Berne Convention acknowledged the right of attribution and integrity through a patchwork of federal and State laws, such as the Lanham Act, the Copyright Act, and the laws on privacy[6].

Since acceding the Convention, there have been some other relevant regulatory developments. I make specific reference to the promulgation in 1990 of the Visual Artists Rights Act (VARA) that protects the right of attribution and the right of integrity of visual arts' authors[7] and to the addition in 1998 of the section 1202 (Integrity of Copyright Management Information [CMI]) to the Copyright Law as part of the Digital Millennium Copyright Act[8]. Furthermore, the acknowledgment of the Right of Publicity[9] intended to secure a minimum

the US legal system to be adequate: D. Gervais, *Le droit moral aux États-Unis*, in *Cahiers de propriété intellectuelle*, 2013, 287-288.

[4] United States Copyright Office, *Authors, Attributions, and Integrity: Examining Moral Rights in the United States. A Report of the Register of Copyrights*, April 2019.

[5] *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) and the remarks of J. C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, in 41 *Houston L. Rev.* 263 (2004).

[6] United States Copyright Office, *Authors, Attributions, and Integrity*, cit., 24-25.

[7] Visual Artists Rights Act (VARA), 17 U.S.C. § 106A.

[8] Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 122 Stat. 2860, 2872–2874 (1998), codified as amended at 17 U.S.C. § 1202.

[9] See J. E. Rothman, *The Right of Publicity. Privacy Reimagined for a Public World*, Cambridge-London, 2018; United States Copyright Office, *Authors, Attributions, and Integrity*, cit., 110, n. 626.

level of protection even in this field, appeared in the same period. Moreover, in 1996 the World Intellectual Property Organization (WIPO) concluded the treaty WPPT which in article 5 safeguards the "moral rights for performers"[10].

Nevertheless, courts have also contributed to the safeguard of moral rights, and in particular of the right of attribution with an extensive application of the Lanham Act[11]. However, the already mentioned Supreme Court's decision of 2003 put a hold on this extensive interpretation highlighting the uncertainty of the authors' position. More recent rulings show that the path of moral rights recognition in the USA is still unsure, as shown for example in relation to the open source licenses[12]. In fact, the Federal Court for the Northern District of California, in so far as attribution and integrity of the work, indirectly protects the rights of the author who are thereby receiving renewed attention[13].

The position of the WTO by promulgating TRIPs – in particular the article 9 that reflects articles 1-21 of the Berne Convention, specifying that the member states have no obligation towards the rights recognized in article 6 bis – is identified by some scholars as a loophole to avoid the application of article 6 bis. In this way, the thesis regarding the marginalization and elusion of the protection of moral rights was reinforced and also corroborated by the position of the Congress. According to the opinion of the aforementioned scholars, the Congress affirmed, in a questionable manner, that the existing US laws regarding the protection of moral rights are sufficient for the application of the protection provided by the Berne Convention. This has substantially impeded the direct application of article 6 bis, thus blocking the main protection issues foreseen in the article.

Moreover, it is considered that the right of attribution is not guaranteed in a systematic way by the American legislation, with the exception of VARA. In this way, the USA are uncompliant with the provisions described in article 6 bis of the Berne Convention, and this 'violation' remains substantially non-penalized[14].

The Copyright Office, however, gives a very different perspective on the topic. In the first place, the Office shares the evaluations of the Congress on the adequacy of the protection of the moral rights assured by national regulation, as we will see in the analysis of the 2019 Report. Secondly, the Copyright Office deems the exclusion of article 6 bis to be normal, given that TRIPs concerns aspects that are mostly economical, while moral rights are not included in this field.

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[10] WIPO Performances and Phonograms Treaty (WPPT) (1996), art. 5.
[11] Lanham (Trademark) Act of 1946, codified as amended at 15 U.S.C.
[12] *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed. Circ. 2008). On more recent developments, see J. C. Ginsburg, *The Most Moral of Rights: The Right to Be Recognized as the Author of One's Work*, in 8 *J. Intern. Comm. L.* 44 (2016).
[13] United States Copyright Office, *Study on Moral Rights of Attribution and Integrity*, in 82 *Federal Register* 7870 (2017).
[14] J. C. Ginsburg, *The Most Moral of Rights*, cit., 49.

In the 30 years since the promulgation of the BCIA, significant technological innovations[15] have changed the context of moral rights in the US and some new business practices have emerged, relying in part on the current legal framework. On one hand, the development of the internet for buying and licensing works of authorship has resulted in original works being more accessible, but their attribution and integrity are more easily subject to manipulation. On the other hand, digital technologies themselves have helped authors against some of these threats to their attribution and integrity interests. Following recent technological transformations, the US Congress has promoted a number of initiatives related to moral rights and has encouraged their protection[16].

According to a recent study preparatory to the pamphlet we are examining[17], the Copyright Office believes that the US legal patchwork could be improved in some areas while providing significant safeguards. The Congress believes that the degree of protection of moral rights should be strengthened and rationalized to avoid undermining the moral rights of authors and artists.

On the basis of the multitude of changes that have occurred in the thirty years examined, the analytical assessments of the protection level of the rights of attribution and integrity in the USA display different opinions among the interested parties. The Copyright Office believes that specific aspects of moral rights, already protected by the existing regulatory patchwork and useful for authors and performers, need additional safeguarding for individual creators. The Congress, in turn, hopes for additional steps to further improve the protection of moral rights through possible amendments on the current legislative framework.

The Copyright Office identifies three general principles that must be considered as essential: the harmonization with the First Amendment, with the *fair use* doctrine[18] and with the provision of a time limit to copyright, which is requested by article 1, Section 8, of the Constitution[19], on the basis of a full appreciation of the principle of public domain. Moreover, an adequate protection of attribution and integrity rights requires differentiated protection to respect the heterogeneity between creative industries and other categories, with the consequent need for different types of safeguards in the various sectors of human ingenuity.

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[15] See now in particular, M. K. Sinha, V. Mahalwar (Eds), *Copyright Law in the Digital World. Challenges and Opportunities*, Singapore, 2017; P. Torremans (Ed.), *Research Handbook on Copyright Law*, 2nd ed., Cheltenham-Northampton, 2017; T. Pistorius (Ed.), *Intellectual Property Perspectives on the Regulation of New Technologies*, Cheltenham, 2018; J.E. Cohen, L. Pallas Loren, R.L. Okediji, M.A. O'Rourke, *Copyright in a Global Information Economy*, 5th ed., Aspen, 2019.

[16] I am referring to the presentations given at a recent conference: *Authors, Attribution, and Integrity. A Symposium on Moral Rights*, April 18, 2016, Washington (DC), published in 8 *J. Intern. Comm. L.* (2016).

[17] United States Copyright Office, *Study on Moral Rights*, cit.

[18] Now codified in Section 107 of Copyright Law.

[19] *U.S. Constitution*, Article I Section 8, Clause 8, Patent and Copyright Clause of the Constitution: "[The Congress shall have power] To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries".

In particular, by ensuring the right to free expression, Copyright Law combined together with the First Amendment protects and promotes freedom of speech and originality of expression. In this sense, increasing the level of protection of moral rights could potentially create tensions with the right to freedom of speech.

The *fair use* doctrine aims at balancing the ability of authors to control the utilization of works under copyright with the right to freedom of speech[20]. *Fair use* promotes the purposes of copyright law by encouraging a broad 'marketplace of ideas', which should stimulate authors to create new works and foster the existing ones. While *fair use* allows to criticize, to comment on and to parody an original work, the moral right of integrity protects the author against any derogatory action that could damage his honor and reputation.

The Copyright Office wonders whether a potential strengthening of the legislation on the protection of moral rights could be compatible with both the First Amendment and the *fair use* doctrine, or if it is preferable to ensure a correct balance of the current regulations.

The Berne Convention states that moral rights must be maintained at least until the expiry of the economic rights, leaving to the adherent countries open options to provide for a specific term[21]. Some countries choose to limit them up to the duration of the economic rights, while others recognize them as perpetual. In the USA the provision of a term to moral rights is due to the strong relevance of the concept of public domain, considered essential for the progress of science. In the opinion of the Copyright Office, moral rights should last for the life of the author or at least until the end of the economic ones, as in Canada and not in perpetuity according to the tradition of the civil law countries.

Within the context of this Report, the Copyright Office took into account the opinions of many writers, musicians and artists, who pointed out the importance of both moral and economic rights. The Office believes that the existing regulatory patchwork is able to adequately respond to many of the concerns expressed and that the possible adoption of a new extensive regulation on moral rights should nevertheless take into consideration the demands of authors.

Moreover, some part of the legal science assumes that the US legal framework grants an appropriate level of protection to moral rights[22]. Other scholars differently state that the same patchwork leaves many areas that are not sufficiently safeguarded. For all of these reasons, the Copyright Office concludes

[20] See *Eldred v. Ashcroft*, 537 U.S. 186 (2003) and the related considerations in Copyright Office, *Study on Moral Rights*, cit., p. 30-31. On the more recent directions of the *fair use* doctrine see the draft *Fair Use in the United States: Transformed, Deformed, Reformed?* presented by Jane Ginsburg on the 11-5-2019 within the workshop series of Columbia Law School.

[21] Berne Convention, art. 6 bis. 2.

[22] See Computer & Communications Industry Association (CCIA), *Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017*, Notice of Inquiry at 2 (3-30-2017); National Music Publishers' Association (NMPA), *Reply Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017*, Notice of Inquiry at 4 (5-15-2017).

that it would be desirable to follow the same path the Congress took thirty years ago, without radical changes that could be harmful to the current legislation[23].

In particular, the Office suggests only three minor modifications to the VARA, which consist in clarifying the definition of 'work of visual art' with regard to commercial works, in amending the 'recognized stature' requirement in order to guide the interpretation of the courts. It also recommends a new section 1202A of the Copyright Law that will more adequately protect authors and copyright owners against removal or alteration of the already mentioned CMI for the purpose of concealing the author attribution information. Finally, the Office urges the Congress to consider the enactment of a federal law on the Right of Publicity, to overcome the uncertainties and ambiguities caused by differences between state laws in this matter.

2. The role of Canada and the ghost of moral rights in the EU Directives

In North America, Canadian copyright must also be taken into consideration given that it is closer to the European civil law model[24]. Canada is in fact the first country in this area to have specifically protected moral rights with the Act of 1931[25], that incorporates the article 6 bis of the Berne Convention[26]. Moreover, Canadian legislation offers a higher level of protection of moral rights than the USA, as shown by a Supreme Court ruling[27] prior even to the adoption of the Copyright Act of 1895.

Canadian protection covers the life of the author and 50 years after his death, and the same term is applied for the economic exploitation rights, given the fact that moral and economic rights are assimilated[28]. Furthermore, the protection of moral rights for performers has been introduced with a forefront approach. Performers are now placed on the same level as authors[29].This close connection

[23] J. T. Pilch, *Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017*, Notice of Inquiry at 1 (3- 30-2017); International Federation of Journalists (IFJ), *Comments Submitted in Response to U.S. Copyright Office's Jan. 23, 2017*, Notice of Inquiry at 6 (3-30-2017).

[24] See T. Scassa, *Canadian Copyright Law in Transition*: atrip.org/wp-content/uploads/2016/06/Scassa-Copyright-Law-in-Canada.pdf; M. Goudreau, *Intellectual Property Law in Canada*, 3rd ed., Alphen Aan Den Rijn, 2017; D.J. Gervais, *The Emergence and Development of Intellectual Property Law in Canada*, in *The Oxford Handbook of Intellectual Property Law*, Oxford, 2018, 265-290. More generally see the important *Cahiers de propriété intellectuelle* for the roots and developments of Canadian copyright.

[25] Copyright Amendment Act, 1931, S.C. 1931, c. 8, s. 5; on which see U. Suthersanen, Y. Gendrau (Eds.), *A Shifting Empire. 100 Years of the Copyright Act 1911*, Cheltenham-Northampton, 2013, 239-41.

[26] On the historical roots of moral rights in Canada, see M. Goudreau, *Le droit moral au Canada*, in *Revue générale de droit*, 1994, 403-428; J.A. Français, *Le droit moral comparé: entre problématique classique et moderne*, in *Cahiers de propriété intellectuelle*, 2000, 315-352; P. E. Moyse, *Le droit moral au Canada: facteur d'idées*, in *Cahiers de propriété intellectuelle*, 2013, 141-172.

[27] See *Snow v. The Eaton Centre Ltd.* (1982), 70 C.P.R. (2d) 105 (Ont. H.C.).

[28] I am referring to Copyright Act, 1985, art. 14.1/14.2, which offers protection to all authors with the exception of performers. For the law in force, see Copyright Act (consolidation), R.S.C., 1985, c. C-42, updated to 22 May 2019.

[29] In line with the WIPO Performances and Phonograms Treaty (WPPT), since 2012 also moral rights for musical performers being safeguarded: Bill C-11, art. 17.1 (3).

between moral and economic rights is highlighted by an important decision[30], in which the Court demonstrates the difficulty of identifying the boundary between the two components of the copyright[31].

Today new paths are under the focus of Canadian scholars and courts, that can also be extended to the safeguard of moral rights. In this perspective, the two worlds of civil law and common law seek convergent solutions. That is to be said in particular about the treatment of orphan works and the parasitism. The first are protected by author's rights, but the authors or other entitled individuals are unknown or cannot be identified[32]. The so-called orphan works find specific consideration in Canada regarding the construction of the discipline, above all of the identification and attribution phases[33].

Parasitism came about in the world of trademarks and industrial patents, with attitudes that thrive on the success of the creator by copying parts of his work. The repeated accustomed extraction or reuse of parts of someone else's work has also been developed within the author's rights. This phenomenon was identified in the middle of the last century in France and Italy[34] and treated in depth by French legal science and case law in the 1990s[35]. They rebuilt the context mostly in correlation to unfair competition. Recently it is limited in France to some references in casebooks[36], and seems to have a renewed interest in Canada[37].

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[30] *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34. See D. J. Gervais, *L'affaire* Théberge, in *Cahiers de propriété intellectuelle*, 2002, 217-239; Id., *The Purpose of Copyright Law in Canada*, in 2 *Un. Ottawa L. & Technological J.* 315 (2005); O. Fischman Afori, *Copyright Infringement without Copying. Reflections on the Théberge Case*, in 39 *Ottawa L. Rev.* 23 (2007-2008).

[31] On the Canadian copyright in the international context, see B.C. Doagoo, M. Goudreau, M. Saginur, T. Scassa (Eds), *Intellectual Property for the 21st Century: Interdisciplinary Approaches*, Toronto, 2014.

[32] M. Bouchard, *Le régime canadien des titulaires de droits d'auteur introuvables*, in *Cahiers de propriété intellectuelle*, 2010, 485-511 and all the traceable material within the institutional website of the Copyright Board of Canada available in cb-cda.gc.ca/unlocatable-introuvables/index-e.html.

[33] I am referring to the workshop *The Canadian Unlocatable Copyright Owners Regime* of 18.04.2019 organized during my visit to Ottawa by Copyright Board of Canada that I thank very much.

[34] See respectively Y. Saint-Gal, *Concurrence déloyale et concurrence parasitaire, ou agissements parasitaires*, in *Revue internationale de la propriété industrielle et artistique*, 1956, 19-106; R. Franceschelli, *Concorrenza parassitaria*, in *Riv. dir. ind.*, 1956, 265-293. The notion has been deepened and taken up by various countries: *La concurrence parasitaire en droit comparé*, Genève, 1981.

[35] See M. L. Finel, *Le parasitisme en droit français*, Thèse, Paris I, 1993; P. Le Torneau, *Le parasitisme : agissements parasitaires et concurrence parasitaire, protection contre les agissements et la concurrence parasitaires, sauvegarde du savoir-faire, des informations, des données et des connaissances des entreprises*, Paris, 1998; F. Jacquand, *Conditionnement de produit, concurrence déloyale et parasitisme*, Thèse, Paris II, 1999; J.-J. Frion, *L'agissement parasitaire*, Thèse, Nantes, 2001.

[36] See for example M. Vivant, J.-M. Bruguière, *Droit d'auteur et droits voisins*, 4th ed., Paris, 2019, 41-44.

[37] On the development of the Canadian legal science and case law regarding the important decision on parasitism of the Quebec Court of Appeal in the case of Groupe Pages jaunes Cie c. 4143868 Canada inc., 2011 QCCA 960, see M. Goudreau, *Le parasitisme sanctionné en Cour d'appel*, in *Cahiers de propriété intellectuelle*, 2011, 1397-1405; and the results reported by the international association APRAM (*Association des Praticiens du Droit des Marques et des Modèles*): available in apram.com/reunions/Documentation-pour-la-conf%C3%A9rence-du-24-avril-2013.pdf.

At present, one of the most controversial points of the European directives lies in the lack of provisions for the harmonization of moral rights. In the past few decades, following some restrictive examples (e.g. the United States up to recent developments), the European interest in the protection of moral rights seems to vanish and their legislative destinies, according to what the 1998 Green Book provides for[38], are entrusted to the sole national legislations[39].

It is worth reminding that during the Rome Conference in 1928 the American delegates proposed that moral rights linked to the individual person were to be protected by each country and not at the international level[40]. This is confirmed by the silence following the Directive on copyright of April 2019[41] and by the explicit statement appearing in its official drafting papers: "Moral rights are not harmonized at the EU level"[42].

It is difficult to come to an agreement with the thesis now put forward in the common law world, according to which the lack of interest of the European Union in moral rights is justified by the complexity of their harmonization[43]. This point of view, in fact, does not consider that the duration and the *droit de suite* have been instead matters of the directives.

Nonetheless, there are hints of strong interest among scholars from all over the world who, 20 years on, under the aegis of ALAI (International Literary and Artistic Association), agreed to further reflect and make new proposals on the future of moral rights in the digital world[44]. It must be noted that the European

[38] Commission of the European Communities, *Follow-up the Green Paper. Working Programme of the Commission in the Field of Copyright and Neighbouring Rights* (COM [90] 5684 final).

[39] See *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, art. 19. On that position see in particular L. Moscati, *Tradizione storica e nuove frontiere della proprietà intellettuale*, in *Riv. it. sc. giur.*, 2011, 212-216; M. Bertani, *Diritto d'autore europeo*, Torino, 2011, 256-265; M.-Ch. Janssens, *Invitation for a 'Europeanification' of moral rights*, in P. Torremans (Ed.), *Research Handbook on Copyright Law*, cit., 200-233; and now M. Mallia, *La tutela dei diritti degli autori nell'Unione europea: occasioni mancate e prospettive future*, in *Attualità del diritto d'autore. Studi in onore di Giorgio Assumma*, Roma, 2018, 414-417. Contrary L.C. Ubertazzi, *La disciplina UE dei diritti morali d'autore*, in *AIDA. Annali italiani del diritto d'autore*, 2016, 349-411, who considers the impact of EU law on national disciplines relating to moral rights to be important.

[40] S. Ricketson-J.C. Ginsburg, *International Copyright and Neighbouring Rights. The Berne Convention and Beyond*, Oxford, 2006, II, 239.

[41] See *Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending directives 96/9/EC and 2001/29/EC*, data.consilium.europa.eu/doc/document/PE-51-2019-INIT/it/pdf.

[42] See *Commission Staff Working Document, Impact Assessment on the Modernisation of EU Copyright Rules Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, 1/3, 6.

[43] See E. Schéré, *Where is the Morality? Moral Rights in International Intellectual Property and Trade Law*, in 41 *Fordham Intern. L.J.*, 784 (2018).

[44] F. Brison, S. Dusollier, M.-C. Janssens, H. Vanhees (Eds), *Moral Rights in the 21st Century. Le Droit Moral au 21ième Siècle. Los Derechos Morales en el Siglo 21. The Changing Role of the Moral Rights in an Era of Information Overload / Le rôle changeant du droit moral à l'ère de l'information surabondante. La evolución de los derechos morales en un contexto e sobrecarga de información*, Brussels, 2015. See also the volumes 25/1 of 2013 (*Les Cahiers de propriété intellectuelle*) and 14/4 of 2019 (*Journal of Intellectual Property Law Practice*), just appeared, almost entirely dedicated to moral rights in various countries of the world.

Copyright Code (ECC) or Wittem Project of 2010[45], which was designed to become a reference model for future legislations in Europe, gives plenty of leeway to the protection of moral rights during the author's lifetime[46]. On the contrary, it provides that the right of divulgation ceases upon the death of the author[47] and that the subsequent rights of integrity and attribution granted to the heirs shall be regulated in a separate legislative text, yet to be specified[48].

It has been argued that such a draft has brought about an unprecedented recognition of moral rights in Europe and namely in the United Kingdom, always "reluctant" to accept their implementation[49]. Indeed, neither the French *Code de la proprieté intellectuelle*[50] nor the Italian Act of 1941 provide for any time limitation for the protection of moral rights[51], as well as other civil law countries[52]. Under the Berne convention, in particular article 6 bis, protection is granted at least until the expiration of the economic rights, after which national legislations apply. As a matter of fact, it was agreed that moral rights were to be protected after the death of the author[53] ever since the resolutions of the Rome diplomatic conference, following the Italian delegation proposal.

The solutions proposed by the ECC rapporteurs, and the remaining part of the draft as well, rely on the willingness to harmonize the two systems[54]. The inspiring model seems to be the Canadian copyright because it establishes the same term for both economic and moral rights and the French *droit d'auteur*, although with the introduction of a limited time span of protection, yet to be defined, for the heirs' rights. At any rate, it is a clear departure from the *droit d'auteur* system, that historically has always considered moral rights as perpetual and associated with the concept of *personne morale*.

Today, the directives face technological challenges from the digital world, and the international systems of protection are often unable to meet the new requirements and seek to reopen the debate on author's rights.

3. For a transcontinental right?

A specific attention is worth giving to the important Chinese Copyright Law of 2010, which is linked to the civil law system with the same emphasis on the

[45] *The Wittem Project. European Copyright Code*, April 2010 (ECC), available in www.copyrightcode.eu. For the first comments in the world of common law and civil law, see respectively J.C. Ginsburg, *"European Copyright Code" – Back to First Principles (with some additional detail)* in 58 *J. Copyright Soc'y USA* 265 (2010-2011); L. Moscati, *Tradizione storica e nuove frontiere della proprietà intellettuale*, cit., 202-205.
[46] ECC, ch. 3.
[47] ECC, art. 3.2.
[48] ECC, art. 3.2-3.4.
[49] J. C. Ginsburg, *"European Copyright Code"*, cit., 268-269.
[50] *Code de la Propriété Intellectuelle*, art. 121.1-121.9.
[51] Act of 22 April 1941, n. 633, art. 20-23.
[52] For an overview see A. Lucas-Schloetter, *Rapport général: le droit moral dans les différents régimes du droit d'auteur*, in *Moral Rights in the 21st Century*, cit., 64-67.
[53] See *Actes de la Conférence de Rome*, cit., 349.
[54] ECC, nt. 22.

protection of the author[55]. Its most relevant feature concerns the safeguard of moral rights[56], which are not studied as much as in other countries. These rights are protected on the basis of the constitutional law and are aimed at the promotion of culture and science[57]. The term *authorial* is used instead of *moral*, even if in the context of the dualist theory, as in the civil tradition.

In particular, article 10 analyses all the faculties of moral rights (attribution, divulgation, integrity, alteration, repentance, etc.) in line with European countries, namely Italy and France, where moral rights are deeply protected, compared to the US common law system. It is worth reminding that the rights of authorship, attribution, integrity, are unlimited in China[58] as well as in the mentioned civil law countries and that publication rights and those relative to artistic and musical works are limited to the lifetime of the author and for five years after his death[59].

In the moment in which a specific interest in the protection of moral rights emerges in the USA, we hope that in Europe market motivations will not prevail over those of the authors, who without any adequate protection and favorable financial support are likely to put their own creativity at risk. We also hope that the voice of the legal science will be heard and its long-standing efforts to globally revise intellectual rights will be acknowledged, to enforce the principles enshrined in the Universal Declaration of Human Rights and in the Charter of Fundamental Rights of the European Union.

Beyond the lack of interest in moral rights, it seems that the European Union is hardly keeping pace by missing those new prospects that can represent the path of the second decade of the 21st century and at the same time safeguard moral and property rights.

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[55] *Copyright Law of the People's Republic of China* (Promulgated by the Standing Committee of the National Congress on February 26th, 2010 and entered into force on April 1st, 2010). See in particular Y. Guo, *Modern China's Copyright Law and Practice*, Singapore, 2017; J. Wang, *Conceptualizing Copyright Exceptions in China and South Africa. A Developing View from the Developing Countries*, Hong Kong, 2018.

[56] See H. Zhonglin, *Author's Moral Rights in UK and China. Development and Protection of IPR in China* (2002), available in www.chinaiprlaw.com/english/forum/forum22.htm; Y. Wan, *Moral Rights of Authors in China*, in 58 *J. Copyright Soc'y U.S.A.* 455 (2010-2011); H. Hansen Kalschuer, *About "Face": Using Moral Rights to Increase Copyright Enforcement in China*, in 39 *Hastings Const. L. Quart'y* 513 (2012); J. Chen, *Étude sur les droits moraux dans la Loi chinoise sur le droit d'auteur*, in *Cahiers de propriété intellectuelle*, 2013, 173-185.

[57] *The Constitution Law of People's Republic of China*, art. 47: "The State encourages and assists creative endeavors conducive to the interests of the people that are made by citizens engaged in education, science, technology, literature, art, and other cultural work".

[58] *Copyright Law of the People's Republic of China*, cit., art. 20.

[59] *Ibid.*, art. 21.